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Comments on the Proposed Defense and Federal Acquisition Regulations

by

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FOR THE COMMANDER

Karl H. Shingler
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Federal Acquisition Regulations

Pamela Samuelson

Abstract. This paper compares and contrasts the software/data rights sections (Subpart 27.4) of the DoD procurement regulations (DoD FAR SUPP) and the Federal Acquisition Regulations (FAR). The regulations currently in force, as well as recently proposed revisions to those regulations, are examined. Criticisms are made of the DoD regulations, as well as suggestions as to how those regulations could be brought more in line with procurement related legislation, intellectual property law and general commercial practice within the software industry. Inconsistencies and ambiguities found in Subpart 27.4 of the DoD acquisition regulations are discussed at some length. A recommendation is made that the DoD adopt a regulatory policy more like that found in the FAR.

Introduction

Until recently, there has been no substantive "data rights" policy under the FAR. Because DoD needed to have a standard policy for acquiring rights in software and technical data, DoD developed its own elaborate policy, which is currently embodied in the DoD FAR SUPP Subpart 27.4.

The Competition in Contracting Act (CICA), passed last year, required development of a substantive data rights policy for federal agency acquisitions. Both CICA and the 1985 DoD Authorization Act reflect Congress' intent that there be a uniform data rights policy for all federal agencies.

Proposed Subpart 27.4 of the FAR is the substantive data rights policy that was issued this past summer to respond to this Congressional mandate. Shortly after issuance of the newly proposed FAR data rights provisions, DoD issued a set of proposed revisions to the DoD FAR SUPP. The comment period on both sets of proposed regulations has been extended to January 9, 1986. DoD has a set of interim rules in effect at this time which are, in most respects, identical to the regulations in effect for the preceding several years.

Although said to "supplement" the FAR, the proposed DoD regulations, if adopted, would entirely supplant the FAR. Supplantation of the FAR is inconsistent with the Congressional mandate for a uniform policy for federal acquisitions. Because of this and because the proposed FAR contains a superior data rights policy, one which is more straightforward and concise, more consistent with commercial practice, and more compatible with other Congressional directives in the CICA and the 1985 DoD Authorization Act, DoD should adopt the proposed FAR rather than the proposed DoD FAR SUPP. If a few additional provisions are necessary to enable the Defense Department to carry out its special mission, DoD should, of course, be able to supplement the FAR to accomplish these objectives. Complete supplantation of the FAR is, however, neither necessary nor desirable.

A. The Need for Clear, Concise, Comprehensible Regulations on Data Rights

One of the priorities DoD should have for its data rights regulations is having regulations which are as simple, straightforward and clear as possible. The current DoD data rights regulations fall short of this goal. The proposed FAR is a distinct improvement in this regard.

The heart of the DoD's data rights policy is the standard data rights clause. (DoD FAR SUPP sec. 52.227-7013.) The current version of the DoD standard data rights clause is very long, very complicated, poorly organized, and ambiguous in some important respects. The new FAR standard data rights clause (although not perfect) is more concise, more straightforward, better organized and less ambiguous than the DoD clause.

It should be evident why a clear, concise, comprehensible data rights regulation is important: those in the procurement community who look to the data rights regulations for guidance need to understand what that guidance is, and how it applies to the situations at hand.

The need for a clarifying revision of the standard data rights policy is made the more compelling because of the complex interrelationship of the DoD regulations and intellectual property law vis-a-vis software. Unlike the hardware systems with which DoD has a long procurement history, software systems are protected chiefly by copyright and trade secret law. Software law is currently in something of a state of flux, which of course, makes the coordination of DoD policy and intellectual property law more difficult, yet even more necessary.

1. Policy on Privately Developed Software

One good example of how the existing DoD regulations unnecessarily complicate data rights matters is in the provision for two kinds of restricted rights for software and yet another set of restrictions ("limited rights") for technical data, including software documentation. It is extremely difficult to understand why there are two kinds of restricted rights for software, especially given that the two sets of rights are very similar but not identical. It is also difficult to comprehend why the regulations subject software documentation (which is generally classified as "technical data") to different restrictions than machine-readable code (i.e., "software"), and why the government has a much broader set of rights as to documentation than as to machine-readable code. This doesn't seem to make sense given that in the commercial market these things are either subject to the same restrictions, or documentation is treated more restrictively than the executable code. Why one would treat commercial software documentation (which DoD allows to be treated the same as machine-readable code) differently than other software documentation is also mysterious.

The newly proposed FAR data rights provisions simplify the software data rights policy by defining "software" to include not only machine-readable code, but software documentation as well. It also provides for only one set of restricted rights to be applicable to software. Thus, the sources of confusion inherent in the more complicated DoD policy are completely avoided in the FAR.

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2. How The Contractor's Retention of a Copyright Affects the DoD's Rights

One good example of an ambiguity in a very important substantive provision of the DoD's data right clause is the effect of a contractor's decision to claim a copyright in publicly funded software on the extent of the government's rights thereafter. Subsection (b) of the DoD standard data rights clause seems to give DoD unlimited rights in all software developed at public expense. Subsection (c) of the same clause seems to say that if the contractor retains a copyright in publicly funded software (which the contractor is entitled to do unless the "special works" clause is used):

> ...the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world of the scope set forth below, under any copyright owned by the Contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Governmental purposes.

The ambiguity is further compounded by the following sentence which declares:

> With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in paragraph (a) above.

This appears to mean that the contractor's retention of a copyright won't affect the government's unlimited rights in the work. But it can't NOT affect the scope of the government's rights. A general rule of contract construction (and after all, the data rights clause is a contract clause) is that ambiguities are resolved against the drafter. If this rule was applied to the interpretation of this problem, the DoD's rights would likely be cut back from an unlimited rights license to a government purpose license when a contractor exercises his right to retain a copyright.

The new FAR policy is structured to avoid this ambiguity. In its section which delineates when the government will have unlimited rights, it explicitly says that the government will have unlimited rights in software developed at public expense unless the contractor copyrights the software in which case the government will have government purpose rights. Thus the new FAR policy avoids a serious ambiguity that lies at the heart of the DoD policy.

B. The Need for Data Rights Regulations That Are More Compatible With Standard Commercial Practices

One of the oft repeated concerns within the defense contracting community is that the Defense Department's current data rights policy as to software is too "confiscatory" to provide meaningful incentives for software firms to offer their best and latest technologies to the government. Some companies are said to refuse to consider doing business with DoD because of the data rights policy. Although DoD certainly has a lot of money to spend on software, the commercial market is currently so large and so lucrative that many of the best software development companies are likely to choose to focus their energies on the commercial market where their proprietary interests are likely to be better protected than if they sell rights in their software to DoD.

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Because of its special mission, DoD will, of course, often need to have greater rights in software (and its associated documentation) than would the ordinary commercial customer. DoD, for example, may need to be able to move the software from one locale to another in wartime or to modify the software in remote locations (such as Indonesia), without having to go back and renegotiate with the software's producer. The software industry seems to be aware that DoD needs greater rights than other customers, and seems to be willing to accept that. However, the wider the gap between the terms on which DoD and the rest of the software market are willing to do business, the more incentives to do business with DoD dwindle, and the fewer the number of firms who will choose to provide their best products to DoD. Thus, if DoD wants to have access to the best technology, DoD should adopt a data rights policy that is no more divergent from standard commercial practices than is necessary to achieve its goals. Several examples of how DoD's policies may diverge from standard commercial practice more than is necessary, and how the new FAR policy would treat these problems, are discussed below.

1. Different Treatment for Documentation and Machine-Readable Code

One substantial respect in which the DoD policy diverges from standard commercial practice in the software field has already been mentioned briefly above in Section A. The standard DoD policy is, in general, much more restrictive about DoD's rights as to machine-readable code (e.g., restricting use of it to one computer or one facility) than as to software documentation (e.g., allowing DoD to use, duplicate, and disclose it throughout the government). Although "commercial software" -- which seems to be interpreted as requiring that at least 55% of a company's sales be made in the off-the-shelf market -- may qualify for an exemption from the limited rights policy as to software documentation, the standard for qualifying as "commercial software" seems high and it seems that one thereby forecloses an opportunity to negotiate further about data rights. It appears that if a software company elects to have its software treated as "commercial software", it and the government may be stuck with the four standard minimum rights. As mentioned above, software firms --- particularly those who do not regularly sell their software on an off-the-shelf basis --- are generally highly protective of their software documentation, even more so than as to their executable code. Just why DoD's policy should diverge so significantly from commercial practice is hard to understand. Also, if DoD is willing to exempt documentation for "commercial software" from this policy, the software industry might wonder why it can't live with the same exemption as to other software documentation.

The new FAR policy, as mentioned above, subjects software documentation to the same set of restrictions as the machine-readable code, and thus averts this collision with commercial practice.

2. Slight Modifications

It is standard DoD policy to take unlimited rights in all software, the development of which was sponsored to any extent with public funds. If a software company developed a piece of software wholly at private expense, and then at the government's request made some minor modifications to it to make it suitable for the intended use by the government, the company may thereby forfeit

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proprietary status for the software. If any DoD funds are used to subsidize the modifications, the government will claim unlimited rights in the software.

Many software industry firms regard this policy as inequitable, particularly in view of the fact that it was only because the government said it needed the modifications that the modifications were made. It is also different from the standard commercial practice. In contrast, the new FAR policy allows contractors to retain the "privately developed" status for their software when only minor modifications are made for the government.

3. Less Than Unlimited Rights in Mixed Funding Situations

As the previous subsection has indicated, DoD takes an "all or nothing" approach to the public funding versus private funding issue. For years the software industry has been urging adoption of a policy that would permit a "middle ground" as to data rights when both private and public funding are used to develop software. The industry was encouraged by that part of the 1985 DoD Authorization Act that called for DoD to reconsider its policy in mixed funding situations.

When late this past summer, DoD promulgated its proposal for revising the data rights regulations which made no policy change as to mixed funding arrangements, the software industry's disappointment was keen. The sense of disappointment was the more intense because the proposed FAR policy (which was announced about a month earlier than the new DoD policy) did contain a provision allowing the government and the contractor to negotiate for less than unlimited rights when both private and public funds were used to develop software. The FAR policy once again is less divergent from standard commercial practice than is the DoD policy.

4. The Test for What is "Developed" at Public or Private Expense

Given that the extent of the government's rights in software depend entirely on whether software is developed at public or private expense, it is curious that the DoD regulations do not define what is meant by the term "developed."

One respect in which the newly proposed DoD data rights regulations differ from their predecessors was in attempting to define this important term. The DoD definition of "developed at private expense" would have required "that completed development [of the software] was accomplished without direct government payment, at a time when no government contract required performance of the development effort, and was not developed as a part of performing a government contract." "Developed" was further defined to require that the software had been not only constructed and used, but "tested so as to clearly demonstrate that it performs the objective for which it was developed."

Industry reaction to this attempted definition was strongly negative. Almost no software would qualify for private development status if such a definition was adopted. It appeared that even if private funds were used to do the development work _after_ the government contract was entered into, the government would claim unlimited rights to it; and if the government insisted that

software be "tested", that too could give the government a "hook" with which to claim unlimited rights.

It is understandable that, in view of Congressional outrage about DoD's data rights policy, there would be some who would think the Department's interests would best be served by taking an expansive view of what "developed at private expense" should mean. But it is equally understandable that the software industry would regard the definition as "confiscatory." If adopted, it would be likely to create substantial disincentives for software firms to do business with DoD. The newly proposed FAR data rights policy is superior to the proposed DoD policy only in not defining the term.

C. The Need For Procurement Regulations That Give DoD the Data Rights It Truly Needs

The previous section has pointed out that in a number of respects DoD's data rights regulations claim broader rights for the government than the software industry may be willing to live with. From this, the reader might get the impression that the only respect in which the author would recommend substantive changes in the regulations would be to trim back somewhat on the government's claim of rights so as to increase industry incentives to deal with DoD. That is not so. There are a number of respects in which the current DoD regulations may confer on DoD fewer rights than the government might need. How the proposed FAR deals with these issues will also be discussed below.

1. Defining Unlimited Rights to Include the Right to Prepare Derivative Works

The current DoD FAR SUPP definition of unlimited rights, both in the policy and contract clause provisions of the procurement regulations is silent as to whether the DoD will have the right to prepare derivative works when it has unlimited rights in software. The current definition speaks only of rights to "use", "duplicate", and "disclose" such software. Derivative works rights are particularly important as to software because maintenance, enhancement, reuse, translation, rehosting, and retargeting are all dependent on having a derivative works right. Thus, if DoD believes that preparing derivative software is important, it would seem prudent to make explicit the DoD's claim to a derivative works right. The proposed revisions to the DoD FAR SUPP fail to rectify this problem.

The proposed FAR, by contrast, provides a more precise definition of "unlimited rights" and in-cludes a right to make derivative works. The argument that DoD's unlimited rights includes a derivative work right despite the silence of the regulations is considerably weakened if the broader FAR definition is adopted while DoD's definition stays the same.

2. The Special Works Clause

When DoD wants to take a direct ownership interest in a work prepared for it by a private contractor, the DoD FAR SUPP directs that the "special works" clause be used in the development contract. The clause in effect claims a direct copyright for the government under the copyright "work made for hire" doctrine. This "special works" clause has been used in a number of DoD software development contracts. Indeed, it appears that a deviation would be required to attempt take a copyright interest in any other manner.

The problem with use of the special works clause for this purpose is that the copyright law specifically prohibits the government from taking direct ownership rights in copyrighted works. See 17 U.S.C. sec. 105. The legislative history of this section reflects that Congress considered the issue of copyright ownership of works prepared for the government by contractors and decided that while agencies could decide to permit contractors to retain copyrights, the government was not to get a direct copyright ownership in works prepared for it.

Copyright law permits the government to own copyrights only by assignment, bequest, and the like. Taking a copyright as if the work was "made for hire" is not the same as taking a copyright by assignment or bequest. What the "special works" clause will be effective in doing is precluding the contractor from claiming any ownership rights in the software. If the Defense Department wishes to obtain a copyright in software, it would be well-advised to adopt a strategy similar to that adopted by NASA and that proposed under the new FAR.

The practice at NASA when ownership and control of software is needed has been to require contractors to obtain copyright protection in the software and then to assign the copyright to NASA. Because Section 105 permits the government to own copyrights by assignment, the NASA policy seems to be consistent with the letter, if not the spirit, of Section 105.

The recently proposed FAR has a somewhat more complicated approach to the "special works" problem than does the NASA policy. Under the allocation of rights provision of the FAR special works clause, the government claims four things: (1) unlimited rights in all data (which includes software and technical data) delivered under the contract and in all data first produced in performance of the contract, (2) the right to control the contractor's exercise of claims of copyright in data first produced in performance of the contract, (3) the right to require the contractor to obtain and assign copyrights in such data, and (4) other rights to limit the contractor's right to control release and use of data developed under the contract. If ownership and control of certain software is what the Defense Department thinks it needs, the Department would be well advised to pursue a strategy similar to that reflected in the new FAR.

3. Four or Five Minimum Rights?

The newly proposed FAR would give the government one additional mimimum right in privately developed software over the four that the current and proposed revised DoD regulations would provide. The fifth mimimum right would give the government the right to disclose or reproduce

software for use by support contractors or subcontractors, subject only to the latter agreeing to abide by the other restrictions that bind the government in its use of the software. The failure of the DoD FAR SUPP to claim this fifth mimimum right may be interpreted as a decision to reject this right. The loss of this fifth mimimum right may impede the ability of DoD to have other firms assist in the maintenance and enhancement of its software.

4. Unlimited Rights in Non-Deliverables

It is standard DoD policy to claim unlimited rights for the government in all software developed with public funds, regardless of whether the software is required to be delivered under the contract or not. Disputes have occasionally arisen when a contractor has refused to deliver -- or at least refused to deliver for free -- software developed under a government contract but not deliverable under the contract. Although DoD policy permits the insertion of a deferred ordering or a deferred delivery clause, in practice this seems rarely done. The newly proposed FAR policy would make a deferred ordering clause a standard feature in government development contracts. This would greatly facilitate acquisition of non-deliverables.

D. The Need for Defense Department Data Rights Regulations That Are Consistent with the FAR Data Rights Regulations

The 1985 DoD Authorization Act granted the Defense Department authority to issue a set of procurement regulations governing the "legitimate proprietary interest of the United States and of a contractor in technical or other data." (See 10 U.S.C. sec. 2320.) However, the grant of authority explicitly states that Congress intended that these DoD regulations should be a "a part of the single system of government-wide procurement regulations as defined in section 4(4) of the Office of Federal Procurement Policy Act." The OFPP Act, at section 4(4), also emphasizes that there shall be a single system of government procurement regulations.

Even more significant is that section's limitation on the authority of individual agencies with respect to supplementing the FAR. Supplements "shall be limited to (i) regulations essential to implement government-wide policies and procedures within the agency and (ii) additional policies required to satisfy the specific and unique needs of the agency." Thus, the pertinent statutes appear to confine the authority of agencies to adopt different policies than those contained in the FAR. To adopt a different policy, it seems that an agency must show that this policy is necessary to carry out the specific and unique needs of the agency.

Although there may be some respects in which the special mission of the Defense Department would require DoD to have a somewhat different data rights policy than other federal agencies, it seems unlikely that the DoD's data rights policy needs differ so substantially from the needs of other federal agencies that a completely different data rights policy is justified for DoD.

For DoD to have a completely different policy than the FAR would seem to run counter to the apparent Congressional intent reflected in three separate statutory provisions (the OFPP Act, the

DoD Authorization Act, and the Competition in Contracting Act). It would also seem unwise to have two different data rights policies on purely practical grounds. Intragovernmental exchanges of software (e.g., NASA to DoD), will be impeded if the application of different sets of rights and different definitions of key phrases depends on which agency let the development contract.

The inconsistency of the DoD FAR SUPP (current and proposed) with the proposed FAR data rights policy is virtually complete. The two sets of regulations do not even define terms in the same way. The DoD FAR SUPP definition of software excludes software documentation; the FAR definition includes it. The DoD FAR SUPP definition of unlimited rights makes no reference to derivative works rights or to public performance or public display rights, whereas the FAR definition includes all three.

Not only do both sets of proposed regulations appear to differ in the extent of the government's rights when software is publicly funded (the FAR's definition being by far the more generous to the government); they also differ as to the extent of the government's minimum rights when software has been developed at private expense. DoD fails to claim the fifth minimum right provided by the FAR -- that which gives the government the right to sublicense to support contractors.

A clause-by-clause analysis of the two sets of data rights regulations reveals that there is not one identical, or even nearly identical provision common to both. Thus, the DoD policy would completely supplant and not merely supplement the FAR, which is not only contrary to Congressional intent, but undesirable from a policy standpoint.

Conclusion

The proposed FAR data rights regulations present a clearer and more concise and comprehensible regulatory scheme than either the current or proposed DoD regulations. The proposed FAR is also more compatible with standard software commercial practices and provides more incentives for industry to make their best technology available to the government than the DoD policy, while at the same time giving to the government a number of rights that even the DoD needs to fulfill its special mission. In addition, both statutory and policy reasons support having a uniform set of federal data rights regulations. For these reasons, it would be desirable for the Department of Defense to adopt a data rights policy, such as that reflected in the proposed FAR.

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THIS PAPER COMPARES AND CONTRASTS THE SOFTWARE/DATA RIGHTS SECTIONS (SUBPART 27.4) OF THE DOD PROCUREMENT REGULATIONS (DOD FAR SUPP) AND THE FEDERAL ACQUISITION REGULATIONS (FAR). THE REGULATIONS CURRENTLY IN FORCE, AS WELL AS RECENTLY PROPOSED REVISIONS TO THOSE REGULATIONS, ARE EXAMINED. CRITICISMS ARE MADE OF THE DOD REGULATIONS, AS WELL AS SUGGESTIONS AS TO HOW THOSE REGULATIONS COULD BE BROUGHT MORE IN LINE WITH PROCUREMENT RELATED LEGISLATION, INTELLECTUAL PROPERTY LAW AND GENERAL COMMERCIAL PRACTICE WITHIN THE SOFTWARE INDUSTRY. INCONSISTENCIES AND AMBIGUITIES FOUND IN SUBPART 27.4 OF THE DOD ACQUISITION REGULATIONS ARE DISCUSSED AT SOME LENGTH. A RECOMMENDATION IS MADE THAT THE DOD ADOPT A REGULATORY POLICY MORE LIKE THAT FOUND IN THE FAR.

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